

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-092

**XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX**

FINAL DECISION ON FURTHER CONSIDERATION

This proceeding on further consideration was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was completed and docketed on January 30, 2010. The Chair subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision on further consideration, dated November 5, 2010, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

PROCEDURAL HISTORY

In an earlier application, Docket No. 2009-058, the applicant asked the Board to correct his record by removing a special officer evaluation report (SOER)¹ for the period June 30, 2006, to December 14, 2006, and a regular OER for the period December 16, 2006, to April 30, 2008 (regular OER).

On September 10, 2009, the Board issued a final decision in docket No. 2009-058 denying relief because the applicant had not proved his allegations against the Coast Guard. However, the Board noted two issues and advised the applicant that it would grant further consideration with regard to them if the applicant submitted a new request regarding those issues within 180 days of the issuance of that final decision.

The two issues left open by the earlier Board in Docket No. 2009-058, were “whether the CO had unilateral authority to remove the applicant from his PSC assigned duty as head of the prevention department and whether the submission of the SOER was a violation of the Personnel Manual in effect at the time of submission. “

¹ Special OERs are reports of evaluated performance other than regular or concurrent OERs directed by reporting officers or higher authority usually documenting performance problems or misconduct. However SOERs are permitted prior to the convening of a selection board. See Article 10.A.3.c. of the Personnel Manual.

ORIGINAL APPLICATION BCMR NO. 2009-058
(Previous case)

The decision in Docket No. 2009-058 is attached for a full and complete understanding of the events, allegations, evidence, and findings of the Board. A limited summary is provided below to aid in the two issues before this Board.

The applicant was assigned to duty as chief of the prevention department at a marine safety unit. On December 14, 2006, he was given an administrative letter of censure² for unacceptable behavior and performance. The commanding officer (CO), who was also the reporting officer for the SOER advised the applicant in that letter that he had lost confidence in his ability to continue as chief of the prevention department and that he was relieved immediately of those duties because the applicant had made sexist and racist statements to subordinates; had taken unauthorized leave on at least five occasions and lied to the CO about one particular incident; had failed to brief the CO as requested using the unit's quick response card series; and had allowed his personnel to attend an initiation ceremony rather than sending them or himself to investigate a grounding incident as the CO directed.

Summary of SOER

The applicant was given a SOER for the period from June 30, 2006 through December 14, 2006. The Personnel Manual requires that SOERs contain a statement as to the reason for their submission in block 2 (description of duties) in accordance with the guidance provided in 10.A.3.c.1. of the Personnel Manual. The subject SOER was submitted under Personnel Manual Article 10.A.3.c.1.a. to "document loss of confidence in [the applicant's] ability to effectively perform assigned duties. Per Article 10.A.4.h.1.c., this OER is derogatory; [the applicant] was relieved of primary duties on 14 Dec 2006."

The supervisor for the SOER is the same individual who had given the applicant 6s and 7s as head of the prevention department on the two previous OERs. In the performance dimensions on the SOER, the supervisor gave the applicant marks of 2 in workplace climate and evaluations; marks of 3 in planning and preparedness, using resources, results/effectiveness speaking/listening, developing others, directing others, and teamwork; a mark of 4 in adaptability; and marks of 6 in professional competence, writing, and looking out for others. In the comments sections accompanying the marks, the supervisor noted that although the applicant's overall performance was poor he had good foresight in procuring needed reference books in advance of implementation of a new international treaty and that he met the challenge in assisting the sector in complying with new security regulations. The supervisor noted the applicant's poor communication with his subordinates and the command; his placement of

² Nonpunitive letters of censure (or administrative letters of censure) are not punitive and may be administered orally or in writing. They are private in nature and shall not be forwarded to the Chief of Personnel, quoted in, or appended to, performance reports, included as enclosures to investigative reports, or otherwise included in official Coast Guard records of the recipient. Article 1.G.1.d. of the Military Justice Manual; Article 8.E.4. of the Personnel Manual.

personal priorities over those of the command; his failure to provide timely briefs on urgent matters; his use of inappropriate sexist comments about a subordinate's wife and racist comments about a senior Coast Guard officer. The supervisor also noted that the applicant submitted two OERs almost five months late and stated that he did not think they were a priority for the command.

In the reporting officer's portion of the OER, the applicant received a mark of 5 in initiative; marks of 3 in judgment, responsibility, and professional presence; and a mark of 5 in health and well-being. In this section the reporting officer noted the problems with the applicant's performance as described in the letter of censure. On the comparison scale in block 9, the reporting officer described the applicant as a marginal performer when compared with other LCDRs the reporting officer has known in his career. (The mark is equivalent to a 2 on a scale of 1 to 7, with 7 being the highest.) The reporting officer did not recommend the applicant for promotion in block 10 (potential). The reporting officer noted that at the time the applicant took over the prevention department, he lacked the proper preparation which should be considered in determining his suitability for retention. The reviewer signed the SOER without comment.

Applicant's Addendum and Reply to the SOER

The applicant challenged each of the allegations made against him in the SOER. His addendum and reply are filed with the OER in his military record.

Applicant's Allegations in Docket No. 2009-058

The applicant alleged in his earlier application that the SOER should be removed from his record because it contained negative statements about his performance and behavior without any investigation, without any documentation, and without any due process. The content of the SOER was contrary to his ten years of prior excellent service, inclusive of the more than two years of prior stellar performance in the same position and under the same supervisor. He argued that given his two years of stellar performance in the same position with the same supervisor, the command should have been able to provide documentation if his performance was as poor as indicated in the SOER. The applicant stated that the SOER was based solely upon the CO/reporting officer's five-month period of observation.

Views of the Coast Guard in Docket No. 2009-058

On May 11, 2009, the Judge Advocate General (JAG) of the Coast Guard submitted the advisory opinion in the earlier case (Docket No. 2009-058) and recommended that the Board deny the applicant's request.

The JAG stated that the SOER was prepared and submitted in accordance with Article 10.A.3.c.1.a. of the Personnel Manual which specifically stated the following: "A special OER may be completed to document performance notably different from the previous reporting period, if deferring the report of performance until the next regular report would preclude documentation to support adequate personnel management decisions, such as selection or

reassignment.” The JAG further stated that the SOER in this particular case was submitted to properly document the CO’s decision to relieve the applicant of his position as head of the prevention department. The JAG argued that the SOER was submitted in accordance with the Personnel Manual.

Applicant’s Reply to the Views of the Coast Guard in Docket No. 2009-058

On July 10, 2009, the BCMR received the applicant’s response to the views of the Coast Guard. The applicant restated the arguments in his basic application.

Pertinent Findings and Conclusions in Docket No. 2009-058

On September 10, 2009, the Board issued a final decision in docket No. 2009-058 and found that the applicant had not carried his burden of proof with regard to the allegations he raised. However, the Board noted two issues, not raised by the applicant that required further development and input from the Coast Guard. In granting further consideration on the two issues the Board stated the following:

First, the Board is concerned whether the reporting officer exceeded his authority by removing the applicant from his department head assignment without approval from PSC. In an advisory opinion in an earlier case, BCMR 2008-091, the JAG stated that that applicant’s superiors committed an error by reassigning her within the command without CGPC³ concurrence. (A reassignment within a unit is not necessarily adverse, but a relief of duties is almost always an adverse action.) The JAG stated that under Article 4.A. of the Personnel Manual, the authority to make officer assignments is specifically reserved for CGPC. Furthermore, in Docket No. 2008-106, the JAG again stated that it was legal error for the CO to have reassigned that applicant from his PCS assigned duty to another duty within the same unit and recommended that the Board grant relief on those grounds. So, if a CO cannot reassign officers within his command, how can he officially relieve an officer assigned by the Personnel Service Command (PSC) without first obtaining the express approval of PSC. Moreover, nothing in Article 10.A.3.c.1. of the Personnel Manual in effect at that time either implicitly or explicitly gives the reporting officer/CO the authority to remove an officer from his primary duty. Although the Board finds the Personnel Manual and specifically Article 10.A.3.c.1. to be silent on the issue of the CO’s authority to remove a department head, we will defer ruling on the issue at this time because the applicant did not raise it and the Coast Guard has not had an opportunity to comment on it.

The second matter of concern to the Board is whether the Coast Guard violated the Personnel Manual by preparing and submitting an SOER under the circumstances presented in this case. Under Article 10.A.3.c.1., the commanding officer may direct an SOER, but the circumstances for submissions of the SOER must be related to one of the subsections described below:

³ CGPC has been reorganized into PSC.

a. An SOER may be submitted to document performance notably different from the previous reporting period if deferring the report of performance until the next regular report would preclude documentation to support adequate management decisions, such as selection or reassignment.

b. An SOER may be submitted after an officer has been found guilty of a criminal offense or has received non-judicial punishment (also known as captain's mast).

c. An SOER may be submitted for an officer being considered by a selection panels or boards for promotion, extension, and continuation on active duty.

d. An SOER may be submitted to document significant historical performance or behavior of substance and consequence which was unknown when the regular OER was prepared and submitted.

e. An SOER may be submitted when specifically directed by another Article of the Personnel Manual, e.g., Article 4.F.6. (CO's and OIC's relief for cause).

Article 10.A.3.c.1. of the Personnel Manual requires block 2 of the SOER to identify the subsection under which the SOER is submitted and include a brief description of the circumstances that prompted the submission. In this case, block 2 states that the SOER was "submitted under PERSMAN Article 10.A.3.c.1.a to document loss of confidence in [the applicant's ability] to effectively perform assigned duties." Lose of confidence in a member's ability to perform his assigned duties is not listed as a basis for submitting an SOER. Nor is relief from primary duty listed as basis for an SOER at the time in question. The basis listed under Article 10.A.3.c.1.a is performance that is notably different from the previous reporting period. The Personnel Manual defines notably different performance as that which results in marks and comments that are substantially different from the previous reporting period and that which results in a change in the comparison scale. Although, the marks, comments and comparison scale mark were substantially lower on the SOER than those on his previous OER, rather than stating in block 2 that the SOER was submitted to document performance notably different from the previous reporting period, the rating chain only cited the pertinent provision and then explained that the SOER was submitted because of a "loss of confidence in [the applicant's] ability to effectively perform assigned duties" In this regard, the Board notes that the reporting officer had not written an OER on the applicant and had been at the unit for only approximately five [months] when the OER was prepared. The reporting officer's loss of confidence in the applicant's ability to perform his duties does not have the same meaning as performance notably different from the previous reporting period, especially when the commanding officer was new, had no

personal knowledge of the applicant's previous OERs, and had not submitted an OER on the applicant.

Furthermore, contrary to the advisory opinion, under the version of the Personnel Manual in effect at time the SOER was prepared, the relief of an officer from his or her primary duty was not an authorized basis for the submission of a SOER. With Change 41 to the Personnel Manual on June 18, 2007 (after the subject SOER was prepared and submitted), an SOER was required upon an officer's relief from primary duty if reassignment was required. Under the circumstances in this case, the Coast Guard appears to have erred by submitting the SOER on the ground of a loss of confidence in the applicant's ability rather than performance notably different from the previous reporting period. The SOER appears to have been submitted not because of performance notably different from the previous reporting period (the CO was not the reporting officer then) but because of his then-current perceptions of the applicant's performance. Further, loss of confidence does not appear to meet any of the other bases for submitting an SOER under Article 10.A.3.c.1. of the Personnel Manual. However, since the applicant did not specifically raise this issue and the Coast Guard has not had an opportunity to comment on it, the Board will defer ruling on the issue at this time.

**APPLICATION ON FURTHER CONSIDERATION DOCKET NO. 2010-092
(Current application)**

On January 29, 2010, the Board received a new application from the applicant seeking further consideration and asking that the special OER be removed from his record based on the following allegations:

[The reporting officer] used as a basis for his action to reassign me from my assigned duties the CG Personnel Manual . . . Article 10.A.3.c.1 stating "loss of confidence" however neither this nor any other article of the [Personnel Manual] provides for reassignment of an officer based on a commanding officer's loss of confidence.

[The reporting officer] acted outside of his authority by reassigning me without prior consultation and consent of the Personnel Service Command (which does have the authority to assign and reassign officers).

The SOER is a derogatory report that I believe was unfairly written. This SOER was conjured up to support my commanding officer's hasty and baseless decision to relieve me from my primary duties as head of the Prevention Department at Coast Guard Marine Safety Unit Galveston, where I had been admirably serving for over 2 years prior to his arrival. There was no exercise of due process for me to hear and respond or rebut the accusations against me despite clear applicable Commandant HR policies directing him to do so.

[The reporting officer] selectively picked from the [Personnel Manual] elements which suited his whim citing “loss of confidence” which is in the stipulations for removal of a commanding officer or an officer-in-charge, but then chose not to follow any of the other stipulations in the removal of the CO/OINC process notably to conduct an investigation prior to relieving me of my duties. This is inherently arbitrary and not in keeping with Commandant’s policies [and] the Coast Guard Core values of honor and respect and devotion to duty.

VIEWS OF THE COAST GUARD ON FURTHER CONSIDERATION DOCKET NO. 2010-092

On June 3, 2010, the Board received the views of the Coast Guard with regard to the two issues on which it granted further consideration. The Coast Guard recommended denial of relief and stated that the applicant’s commanding officer (CO) had the authority and did not commit an error or injustice in exercising his discretion to remove the applicant from his primary duties and internally reassign him; nor did the rating chain commit any error with regard to the submission of the special officer evaluation report (SOER). The JAG stated the following:

[Did the applicant’s CO have the authority to remove the applicant from his primary duties?] Based on the facts and circumstances of this particular case . . . the applicant’s CO acted within his authority to temporarily reassign the applicant from his primary duties. In the applicant’s previous BCMR, the Board mentioned the AO [advisory opinion] in Docket No. 2008-106 in comparison to this case. It is the [Coast Guard’s] position that 2008-106 is distinguishable from the case at bar. [BCMR No.] 2008-106 was decided based on a “totality of the circumstances” presented, which were completely different from applicant’s case. Moreover, the advisory [opinion] in 2008-106 was never intended to indicate shifts in [Coast Guard] policy as it pertains to [the] CO’s authority to reassign members under his/her command. Furthermore, [BCMR No.] 2008-106 was extremely unique in nature based on its own particular facts and circumstances and therefore should not be used or viewed as precedent in comparison with the case at bar. The applicant was assigned from his primary duties and subsequently transferred IAW [in accordance with] policy. . . .

[Was the applicant’s SOER submitted in violation of Article 10.A.3.c.1 of the [Personnel Manual]]? . . . The “SOER” in this particular case was submitted by the applicant’s rating chain to properly document the [CO’s] decision to relieve the applicant of his position as Prevention Department Chief. The [SOER] accurately reflects the applicant’s serious performance deficiencies as declared by the applicant’s immediate supervisor, commanding officer, and reviewing official. The applicant’s rating chain carried out its responsibilities and submitted the applicant’s [SOER] in accordance with the Coast Guard Personnel Manual . . .

The JAG attached a memorandum from the Commander, Personnel Service Command (PSC) as a part of the advisory opinion. PSC also recommended denial of the applicant’s request. PSC stated that there are two types of reports at issue in this case. They are the

exception OERs, which includes special and concurrent OERs, and derogatory OERs. PSC stated that an exception OER is justified when OER submission criteria does not meet the scheduled occasions or criteria for submitting a regular OER. An exception OER can address either standard, above standard, or substandard performance. See Article 10.A.3. of the Personnel manual.

PSC stated that derogatory OERs are those evaluation reports that indicate the reported-on officer failed in the accomplishment of assigned duties. According to Article 10.A.4.h. derogatory OERs are those which contain a numerical mark of one in any performance dimension, contain an “unsatisfactory” mark by the reporting officer in section 9; and/or is used to document adverse performance or conduct that results in the removal of a member from his or her primary duty or position. PSC noted that under 10.A.3.c.1., a special OER submission must relate to the following among others:

a. An SOER may be submitted to document performance notably different from the previous reporting period if deferring the report of performance until the next regular report would preclude documentation to support adequate management decisions, such as selection or reassignment.

PSC also noted that Article 10.A.3.c.1. of the Personnel Manual requires block 2 of the SOER to identify the subsection under which the SOER is submitted and include a brief description of the circumstances that prompted the submission. PSC argued that the rating chain did this in the SOER by the statement: “Special OER submitted under PERSMAN Article 10.A.3.c.1.a. to document loss of confidence in member’s ability to effectively perform assign duties.” (The CO further explained: “Per Article 10.A.4.h.1.c., this is a derogatory OER, member was relieved of primary duties on 14 Dec 2006.”) PSC stated that the Personnel Manual permits a special OER where performance is notably different from the previous reporting period and results in a lower mark on the section 9 comparison or rating scale. PSC stated that this did occur in this instance. He further explained as follows:

The member’s inability to perform his duties is the conduct/performance that is at issue. Both the supervisor’s and reporting officer’s statements (e.g. addendums, declarations etc. [in the earlier case]) indicate the marks and comments they assigned were fair and accurate depictions of the applicant’s performance during the marking period and indicate there was dissension in the work environment causing distress amongst the workforce as well as concerns by senior members that tasks were not being completed, orders not being followed, and serious questions being raised whether mission accomplishment was at risk. With this in mind the rating chain removed the applicant from his duties and prepared the Special OER in accordance with the PERSMAN . . .

The applicant (and the previous BCMR decision) states “loss of confidence” is not listed under the PERSMAN Article 10.A.3.c.1 and cannot be used to reassign him from his primary duties. [Coast Guard] PSC avers the applicant has confused the article under the PERSMAN. Again, one being removed from primary duties follows an entirely separate Article (10.A.4.h) than the Exception (special OER)

Article (10.A.3.c.1.). The applicant's removal and reassignment was based on adverse performance and/or conduct as described within the text of the disputed OER . . . It is the derogatory article that drives the removal and reassignment of the reported-on officer. The Exception OER article was used in conjunction with the Derogatory Article since the disputed OER was being submitted prior to the normal regular submission date of 30 April—the typical end of period date for a lieutenant commander – and the evaluation was capturing performance notably different than the previous reporting period.

a. The applicant is correct that loss of confidence is not specifically stated in Article 10.A.3.c.1. However, there is nothing in paragraph (a) of this article that states certain language must be cited verbatim or that language is precluded. The paragraph simply states the OER should document performance notably different.

...

b. Loss of Confidence is a term of art used in military service when a military member fails to sustain his or her immediate superiors' trust or confidence in the member's judgment, abilities, responsibilities, performance, discipline, and mission accomplishments. The term is sometimes used when a commanding officer or officer in charge is relieved for cause. Though no such term of art is specifically set forth for individuals not in command cadre positions, there is nothing to prevent it being used-especially when common usage is understood. [Coast Guard] PSC believes the term "loss of confidence" coupled with the statement of the applicant's inability "to effectively complete his assigned duties" is acceptable as denoting performance notably different.

PSC noted that in the previous final decision the Board questioned whether the reporting officer's ability to evaluate the applicant's performance because the SOER was his first on the applicant, because the reporting officer had only a five-month period to observe the applicant, and because the reporting officer was not privy to the applicant's past performance. However, PSC stated that he was not convinced these reasons prevented the reporting officer from properly evaluating the applicant. In this regard, PSC stated that the reporting officer is not limited to his or her own observations, but may use other information provided by the supervisor or any other reports and records he or she deems reliable. PSC stated that there is every indication there were discussions of the applicant's conduct and performance as evidenced in every rating chain declaration presented. He stated the fact that the same supervisor was still present at the unit, had previous knowledge of the applicant's prior performance, and noticed a difference in the work atmosphere in the prevention department is of utmost significance and certainly material that the reporting officer utilized, as likely did the reviewer.

PSC stated that it was unclear what the applicant meant by the allegation that the CO acted outside of his authority by reassigning him without consulting or obtaining approval from PSC. PSC stated that according to ALCGOFF 017-06 message, the CO is not required to notify PSC that he has moved someone under his command to another position unless the move would

extend past the six-month mark.⁴ PSC stated that it was 4½ months between the applicant's removal from his position in December 2006 and the time he left MSU Galveston on PCS order to Washington, D.C. During this period he was reassigned on an interim basis to Sector-Houston-Galveston on February 5, 2007. PSC stated that on March 5, 2007 Permanent Change of Station (PCS) orders were issued transferring the applicant to Coast Guard Headquarters.

PSC noted that the Board used BCMR No. 2008-106 as precedent. In that case, the JAG stated that COs did not possess the authority to internally reassign officers without action from PSC. The JAG clarified that while permanent transfers cannot occur without PSC's concurrence, temporary reassignments are historically supported under policy. PSC stated that foundational guidance is provided within the Coast Guard regulations, which states that when the CO believes circumstances require, he or she may assign a commissioned officer or warrant officer to duty other than the duties ordered to. However, for periods over 30 days the commanding officer shall report the fact to the Commandant, which in this case is PSC. PSC stated that in 2006 this policy was reaffirmed and amended in order to prescribe the CO's ability to internally assign officers to accomplish mission objectives for periods not to exceed six months.⁵ Periods beyond six months require consultation with PSC. A permanent transfer does not relieve a command of the duty to document an officer's performance shortfalls. PSC stated that ALCGOFF 017-06 reaffirmed that removal from primary duties due to adverse performance or conduct shall be documented in accordance with Articles 10.A.3.c. and 10.A.4.h. of the Personnel Manual.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD ON FURTHER CONSIDERATION

On June 29, 2010, the Board received the applicant's reply to the views of the Coast Guard. On the issues before the Board on further consideration, the applicant stated the following:

In the advisory opinion's conclusion, they state that the CO acted within his authority to temporarily reassign the applicant. However, the CO did not temporarily reassign me as the advisory opinion inaccurately asserts. Had he done so in accordance with [Personnel Manual] policy it should have been in concert with conducting an official investigation (per 10.A.3.c.1.b.) and would have been agreeable. Rather he simply removed me from my [Personnel Service Center] assigned duties and replaced me with the newly arrived deputy.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the submissions of the applicant and the Coast Guard, the military record of the applicant, and applicable law:

⁴ The Coast Guard is incorrect that ALCGOFF 017/06 stated that assignments more than six months in length must be reported to the assignment officer. It was ALCGOFF 037/08 issued on March 25, 2008 that mandated this requirement.

⁵ The Board has already noted that the 6-month reassignment policy went into effect on March 25, 2008 pursuant to ALCGOFF 037/08.

1. The BCMR has jurisdiction of the case pursuant to section 1552 of title 10, United States Code. The application was timely.

2. The findings and conclusion addresses only the two issues on which the Board granted further consideration. They are whether the CO had unilateral authority to remove the applicant from his PCS assigned duty as head of the prevention department and whether the submission of the SOER was a violation of the Personnel Manual in effect at the time of submission. The Board resolved and disposed of all other issues with respect to lack of counseling, lack of due process, and lack of investigations in its final decision in Docket No. 2009-085.

3. The Board raised the question of the CO's authority to remove an officer from his PCS assigned duty (primary duty) because in another earlier case, Docket No. 2008-091, the JAG took the position that the CO lacked the authority to internally reassign that applicant to another position within the command without CGPC's (now PSC's) approval.⁶ The JAG further noted in that case that under Article 4.A. of the Personnel Manual, the authority to make officer assignments is specifically reserved for PSC, which was affirmed by the Commandant in ALCGOFF 017-06 issued on March 9, 2006. The JAG took the same position in Docket No. 2008-106 and stated that it was legal error for the CO to have reassigned that applicant from his PCS assigned duty to another duty within the command without at a minimum notifying the assignment officer (AO).⁷

4. The JAG currently argues that the CO has the authority to remove or relieve the applicant from his PCS assigned duty as head of the prevention department and reassign him, under Article 7-5-1B of Coast Guard Regulations and ALCGOFF 017/06. However, these authorities were in effect and known to the Coast Guard when it issued its recommendations in Docket No. 2008-106 and Docket No. 2008-091. Article 7-5-1B of Coast Guard Regulations states the following:

When circumstances require, the [CO] may assign a commissioned or warrant officer to duty other than the type specified in the orders assigning the officer to the unit. When, under the authority of this section, an officer is assigned for a period of more than 30 days to perform duty in lieu of the type specified in his orders, the commanding officer shall report the fact to the Commandant.

⁶ The JAG stated in Docket No. 2008-091 that the applicant's superiors committed an error by reassigning the applicant to another duty within the command. The JAG stated that the CO lacked the authority to internally reassign the applicant to another position within the command without CGPC concurrence. The JAG stated that under Article 4.A. of the Personnel Manual the authority to make officer assignments is specifically reserved for CGPC.

⁷ Docket No. 2008-106, the Board wrote that the JAG stated the following in pertinent part in the advisory opinion:

[The CO's] decision to relieve the applicant of his duties as the Chief of the [NATON school], placing him into a position of lesser responsibility and opportunity for leadership stemmed from information provided in an inaccurate OER. The JAG noted that the disputed OER in that case reflected the applicant's performance in an unauthorized reassignment with less responsibility for leadership. The JAG stated that the reassignment constituted "legal error."

With regard to the above, the JAG contended that while permanent transfers cannot occur without PSC's concurrence, temporary re-assignments are historically supported under this policy. However, ALCGOFF 017/06 issued on March 9, 2006, added confusion to the Coast Guard regulation because CGPC clearly indicated in that message that it was the official order issuing authority, but allowed COs to request approval of intra-unit reassignments. The Coast Guard added further confusion to this issue by finding legal error with the reassignments of the applicants in 2008-091 and 2008-106. The Coast Guard clarified the issue somewhat in ALCGOFF 037/08 issued on March 25, 2008, by directing that COs at a minimum inform the assignment officer (AO) of internal reassignments expected to last more than six months. However, ALCGOFF 037/08 was not applicable to the applicant's situation because his removal from duties and the SOER occurred prior to the issuance of this message.

5. Therefore, the policy in effect at the time of the applicant's removal from his primary duty was ALCGOFF 017/06 issued on March 9, 2006. It stated in pertinent part:

To meet the personnel needs of commands, reduce unintended negative consequences for members or the service as a whole, support cross-training opportunities, and to improve HR [human resources] data accuracy, commands shall contact the appropriate CGPC AO to propose moving officers from one position to another year, the best time to do this is immediately prior to the assignment season . . .

This process is not intended to replace the assignment process particularly for fleet-ups . . . This process also does not relieve a unit of the duty to document performance shortfalls in accordance with [the Personnel Manual] for officers that have difficulty performing in their assigned position. Removal from primary duties due to adverse performance or conduct shall be documented IAW Articles 10.A.3.C. and 10.A.4.H. of the [Personnel Manual].

An officer's primary duty is defined by the unit PAL [personnel allowance lists] as shown in Direct Access and is the position that is indicated on the member's permanent change of station orders.

5. The Board disagrees with the Coast Guard that ALCGOFF 017/06 authorized the removal of an officer from his primary duty who received a derogatory OER under Article 10.A.4.h.1.c. of the Personnel Manual and that the derogatory SOER was the driver for the applicant's removal from his primary duty in this case. Article 10.A.4.h.1. only defines a derogatory OER; it does not authorize the CO to remove an officer from his primary duty or position due to poor performance or misconduct. The provision defines a derogatory OER as one that contains a mark of 1 in any performance dimension, contains an unsatisfactory mark by the reporting officer in section 9 (comparison scale), or *documents* adverse performance or conduct that results in the removal of a member from his or her primary duty or position. It documents the results of a removal from primary duties; it does not authorize it. Nor did Article 10.A.3.c.1. of the Personnel Manual authorize the CO to remove an officer from his primary duty at that time.

6. Therefore, under Coast Guard regulation, the CO had limited authority to assign /reassign within his command but could not remove or dismiss an officer from their primary duty without the approval of PSC. ALCGOFF 017/06 affirmed this interpretation by reserving the authority to make assignments to CGPC. In this regard, Article 4.A. of the Personnel Manual and ALCGOFF 017/06 state that CGPC “exercises directing, guiding, and restraining authority over enlisted and officer assignments.” Therefore, the Board concludes that at the time in question, the CO could not remove the applicant from his PSC assigned duty without the approval of CGPC.

7. Notwithstanding finding 6. above, the Board finds that CGPC was aware of the CO’s decision to remove the applicant from his primary duty because according to the Investigating Officer’s (IO) report into the applicant’s Article 138 complaint, CGPC advised the CO on the preparation of the SOER which documented the CO’s loss of confidence in the applicant and his decision to remove the applicant from his primary duty (Paragraph 2 of Enclosure (2) of the IO report into the applicant’s Article 138 complaint). Also, CGPC validated the SOER on March 3, 2007, and placed it into the applicant’s record. Therefore, by not objecting to the CO’s action when providing guidance in preparation of the SOER and by validating the SOER and placing it into the applicant’s record, CGPC approved the CO’s decision to remove the applicant from his primary duty and subsequently issued permanent change of station orders assigning him to Washington, D.C. Additionally, Fact 35 of Enclosure (1) of the IO report into the Article 138 complaint stated that “[t]he Sector Commander and Deputy Sector Commander met with [the applicant] for 2 hours on January 22, 2007, to discuss his relief and pending [SOER].” Therefore, the Board finds that the CO removed the applicant from his primary duty with the knowledge and approval of CGPC.

8. The Board notes as it did in the original decision that the Coast Guard has no procedures in place for removing officers, other than COs or officers-in-charge, from their primary duties. The lack of regulation in this area makes it difficult for the Board to review applications alleging injustice and/or error in the process because there are no standards by which to measure whether a removal from primary duty was carried out in a just and equitable manner. The Board notes that there are procedures in Article 4.F. of the Personnel Manual for relieving a CO or OIC and that the Navy has procedures in place for removing officers from their primary duty, as well as relieving COs. The Board refers the Coast Guard to Article 1611-020 of the MILPERSMAN (the Navy’s Military Personnel Manual) which authorizes the detachment of officers and well as COs for cause and provides procedures for their detachment.⁸ In each instance, Article 4.F. of the Coast Guard Personnel Manual (removal of CO’s and OICs for cause) and the Navy’s MILPERSMAN, officers are given an opportunity to submit a statement on the proposed action which is forwarded to higher authority for review along with the request for removal from duty. The Board recommends that the Coast Guard review its policy in this area by making regulations that informs its officers as well as any reviewing authorities how and when officers are to be relieved of their primary duties and the procedures for doing so. The lack

⁸ The Board notes that section 1-5.d. of AR 600-20 (Army regulation) dated March 18, 2008 states that “soldiers are assigned to stations or units where their services are required. The commanding officer then assigns appropriate duties.” It is unclear whether this provision applies to officers. Section 3-50 of AR 623-105 (1998) discusses in detail the standard for relieving an officer for cause and what information must be included in a performance evaluation when an officer is relieved for cause.

of written guidance led the applicant's CO to use "loss of confidence" as the basis for removing the applicant from his primary duty, which is listed as a basis for relieving COs and OICs. If the bases for removing officers from their primary duties are the same as those identified for the removal of COs, then it appears to the Board that Article 4.F. should apply to all officers and that all officers should get the benefit of what little due process is provided under that Article. The only due process provided to a CO or OIC facing relief for cause is notification of the proposed action, notification of the right to submit a statement in writing on his or her behalf within five days of notification, which is forwarded to the relieving authority along with the request for permanent relief for cause, and notification of the temporary duty station to which the officer will be assigned while the action is pending. The applicant was not given the opportunity to submit a written statement in response to the CO's decision to remove him for review by higher authority because there are no regulations in this area. However, the Board finds that the applicant had some due process because he was notified of the action in the December 14, 2006 letter of censure, given the opportunity to write an addendum and reply to the SOER that noted his removal from primary duty, and had his Article 138 complaint against the CO investigated. Moreover, there is no evidence in the record that the decision to remove the applicant from his primary duty would have been any different had he had the opportunity to write a statement for review by higher authority prior to his removal from his primary duty.

9. The Board noted its concern in the previous decision that "loss of confidence" was not listed in Article 10.A.3.c.1. as a basis for submitting a SOER. This provision states that the commanding officer may direct an SOER, but the circumstances for submission of the SOER must be related to the following reason (among others not relevant to this case):

An SOER may be submitted to document performance notably different from the previous reporting period if deferring the report of performance until the next regular report would preclude documentation to support adequate management decisions, such as selection or reassignment. Notably changed performance is that which results in marks and comments substantially different from the previous reporting period and results in a change in section 9 comparison or rating scale.

10. Further, Article 10.A.3.c.1. of the Personnel Manual requires block 2 of the SOER to identify the subsection under which the SOER is submitted and include a brief description of the circumstances that prompted the submission. In this case, block 2 states that the SOER was "submitted under PERSMAN Article 10.A.3.c.1.a to document loss of confidence in [the applicant's ability] to effectively perform assigned duties." The Board noted in the earlier case that loss of confidence in a member's ability to perform his assigned duties is not listed as a basis for submitting an SOER. Nor was relief from primary duty listed as basis for an SOER at the time question.

11. After further review, the Board agrees with the Coast Guard that the SOER in this case met the requirements of Article 10.A.3.c.1. In this regard, the SOER identifies 10.A.3.c.1.a., which is performance notably different from the previous reporting period, as the basis for submission of the SOER. The brief description of the circumstances for the OER is loss of confidence in the applicant to effectively perform his assigned duties. Upon further

consideration, the Board agrees with the Coast Guard that performance that notably different from the previous reporting period can result in a CO's loss of confidence in an officer. Moreover, the applicant's performance was notably different from the previous reporting period. He received a mark of 2 (marginal performer) on the comparison scale for the SOER and a mark of 6 (strongly recommended for acceleration) on the previous OER. In addition, the applicant received below average marks of 2s and 3s and unflattering comments on the SOER compared to marks of 5s and 6s and highly favorable comments on the previous OER.

12. The Board also agrees with the Coast Guard that although the CO had only been at the command for five months when he gave the applicant the SOER, under the Personnel Manual he could rely on the memory, knowledge, and reports of the supervisor in making a determination whether the applicant's performance was notably different from the previous reporting period. The same officer served as supervisor on the SOER and the applicant's previous OER. Article 10.A.4.7.d. of the Personnel Manual states that the reporting officer shall include comments citing specific aspects of the reported-on officer's performance and behavior for each mark that deviates from a four. It provides that the reporting officer shall draw on his or her own observations, information provided by the supervisor, and other information accumulated during the reporting period. Additionally, the Board noted in the original case that the applicant had not proved the content of the SOER to be erroneous. Therefore, the SOER was properly submitted to document performance that was notably different from the previous reporting period that led to the CO's loss of confidence in the applicant.

13. Having reviewed the issues on which the Board granted further consideration, the Board finds that CGPC affirmed and validated the CO's decision to remove the applicant from his primary duty by not acting to change it when it provided assistance to the CO in the preparation of the SOER, by not acting to change it when it validated the SOER on March 3, 2007, and by issuing PCS orders to the applicant for an assignment in Washington, D.C. Additionally, the Sector and Deputy Commanders were aware of the decision to remove the applicant from his primary duty and did not object. Further, the Board is persuaded that the submission of the SOER was proper.

14. Accordingly, relief should be denied for the issues on which the Board granted further consideration.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application on further consideration of XXXXXXXXXXXXX, USCG, for the correction of his military record is denied.

Donna M. Bivona

Evan R. Franke

Darren S. Wall